Supreme Court, U.S.
FILED

961719 APR 23 1997

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States
October Term, 1997

MATTHEW J. GALLO, AL DUMAS, THOMAS E. GRAY, NEAL GOLDBERG, and ELIJAH LEWIS, individually and and on behalf of all others similarly situated,

Petitioners,

v.

AMOCO CORPORATION as PLAN ADMINISTRATOR and the EMPLOYEE RETIREMENT PLAN of AMOCO CORPORATION and PARTICIPATING COMPANIES,

Respondents.

Petition for Writ of Certiorari to the The United States Court of Appeals for The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

James R. Potter
Counsel of Record

Miriam N. Geraghty
Jesse A. Wing
Kinoy, Taren, Geraghty & Potter, P.C.
332 S. Michigan Avenue, Suite 1705
Chicago, Illinois 60604
Telephone Number: (312) 663-5210

17 pp

QUESTION PRESENTED

Eighteen thousand participants in the Employee Retirement Plan of Amoco Corporation (the "Retirement Plan") who received pay in lieu of vacation upon termination or retirement from Amoco suffered a loss of $125 million in pension benefits as a result of Amoco's undisclosed practice of excluding such pay from pensionable "earnings" in the Annuity Benefit formula of the Retirement Plan. Amoco includes pay in lieu of vacation as earnings in the Career Average Minimum formula of the Retirement Plan which shares the identical earnings definition. Moreover, Amoco includes pay in lieu of vacation as "earnings" or "compensation" in two related plans: the Employee Savings Plan ("Savings Plan") and the Variable Incentive Plan ("VIP Plan"), which share virtually identical earnings definitions. By contrast, Retirement Plan participants who take vacation (rather than pay in lieu) prior to termination receive both service and earnings credit under both Retirement Plan formulas as well as in the Savings Plan and VIP Plan for the vacation payments received by them. The question presented here is:

Does a pension plan fiduciary abuse his interpretive discretion under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and his duty under 29 U.S.C. § 1102(a)(1) to maintain an "employee benefit plan . . . pursuant to a written instrument," when without textual authority in the plan and without disclosure to plan participants, he detrimentally excludes compensation from a pension formula contrary to the uniform plan definition, solely on the basis of theoretical rationalizations which are presented for the first time after the practice is challenged in court?

TABLE OF CONTENTS

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED IN THIS CASE 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Batchelor v. International Brotherhood of Electrical Workers Local 861, 877 F.2d 441 (5th Cir. 1989) 6, 7, 11

Dennard v. Richards Group, Inc., 681 F.2d 306, 314 (5th Cir. 1982) 6, 8

Finley v. Special Agents Mutual Benefit Association, Inc., 957 F.2d 617 (8th Cir. 1992) 7, 10

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) . . . . . i, 5, 10

Massachusets Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 6

Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983) 6

STATUTES

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1331 2,4

29 U.S.C. § 1102(a)(1) . . . . . i, 3

29 U.S.C. §§ 1132(e)(1) and (f) 2, 3, 4

OTHER AUTHORITIES

Restatement (Second) of Trusts § 187, comment d 11

PETITION FOR WRIT OF CERTIORARI

Plaintiffs respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit which reversed the decision of the district court on December 17, 1996, in order to decide an important issue of Federal ERISA law arising under *Firestone* and to resolve a conflict between the Seventh, Eighth, and Fifth Circuits over the weight to be given an ERISA plan's text in deciding benefit claims.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit that gives rise to this petition is published at 102 F. 3d 918 (7th Cir. 1996), *rehearing and rehearing en banc denied*. It is reprinted in the separately filed Appendix at A-1 to A-12. The opinion of the United States District Court for the Northern District of Illinois is published at 910 F.Supp. 396 (N.D. Ill. 1995) and is reprinted in the Appendix at A-13 to A-37. The order of January 24, 1997, denying rehearing is reprinted in the Appendix at A-38 to A-39.

JURISDICTION

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 29 U.S.C. §§ 1132(e)(1) and (f). Amoco Corporation is an Indiana corporation with its principal place of business in Chicago, Illinois. The Employee Retirement Plan of Amoco Corporation and Participating Companies ("the Plan") is a defined-benefit pension plan sponsored by Amoco for its employees.

On December 8, 1995 the United States District Court for the Northern District of Illinois granted summary judgment to the class of former Amoco employees who received pension benefits under the Plan and ordered Amoco to recalculate their pensions in accordance with the terms of the Plan. On December 27, 1995, petitioners filed and the district court granted their Motion to Amend Judgment to Add Prejudgment Interest and For Other Relief. A final judgment order entered on February 20, 1996, directed the Clerk of the Court to enter judgment *nunc pro tunc* as of February 12, 1996. On March 1, 1996, Amoco filed a Notice of Appeal to the Seventh Circuit Court of Appeals. The Seventh Circuit had jurisdiction pursuant to 18 U.S.C. § 1291. On December 17, 1996 that court entered its decision reversing the District Court and ordering that the case be dismissed. On January 24, 1997, the Seventh Circuit denied petitioners timely-filed motion for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1102 (a)(1), provides:

> § 1102. Establishment of plan
>
> (a) Named fiduciaries
>
> (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

STATEMENT OF THE CASE

After exhausting remedies under the Amoco Pension Plan and receiving a final denial letter from the plan fiduciary, petitioners filed a timely class action ERISA Complaint on September 24, 1994. The district court had

jurisdiction over the action pursuant to 28 U.S.C. § 1331 and 29 U.S.C. §§ 1132(e)(1) and (f).

On December 8, 1995, the district court ruled in favor of petitioners, finding Amoco's undisclosed administrative practice of excluding pay in lieu from one of the Plan's benefit formulas to be in conflict with the plan text, with Amoco's inclusion of pay in lieu of vacation in another formula sharing the same earnings definition and with Amoco's otherwise uniform policy of including such payments in related Amoco plans containing the same or similar earnings definitions.

Subsequent orders of the court entered on December 27, 1995 and February 20, 1996 awarded petitioners prejudgment interest at the prime rate. Amoco filed a timely notice of appeal on March 1, 1996.

The Seventh Circuit Court of Appeals reversed the district court and held that a pension plan administrator may inconsistently interpret a uniform definition of "earnings" in the Retirement Plan so long as a rational *post hoc* justification for such treatment is proffered in court, even though neither the practice nor its justification was disclosed to plan participants, and regardless of the administrator's otherwise uniform treatment of earnings in the Retirement Plan and two related plans.

Petitioners' petition for rehearing and suggestion for rehearing en banc was denied.

REASONS FOR GRANTING THE WRIT

I. In Derogation of *Firestone*, the Seventh Circuit's Opinion Reduces Judicial Review of Fiduciary Benefit Determinations to an Abject Deference, Thereby Creating a Direct Conflict with the Fifth and Eighth Circuits, Which Require Plan Administrators to Comply with Plan Text and Summary Plan Description When Making Benefit Decisions

The decision below is contrary to Congressional intent in passing ERISA as a means of protecting employee pension expectations. Congress sought in ERISA to give redress to plan participants from arbitrary treatment by plans and employers who fail to abide by their pension commitments.

As this Court stated in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989):

> ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans,' *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983), and 'to protect contractually defined benefits,' *Massachusets Mutual Life Ins. Co. v. Russell*, 473 U.S., at 148.

These concerns necessarily emphasize the importance of enforcing the terms of plans which give rise to employee rights.

The Fifth Circuit's decision in *Batchelor v. International Brotherhood of Electrical Workers Local 861*, 877 F.2d 441 (5th Cir. 1989), honors the importance of plan text by making it a central focus of analysis. Quoting from the Fifth Circuit's earlier decision in *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982), *Batchelor* sets forth a systematic procedure for analyzing pension plan benefit claims. This review process requires that:

> First the court must determine the [legally] correct interpretation of the Plan's provisions. Second, the court must determine whether the Plan administrators acted arbitrarily or capriciously in light of the interpretation they gave the Plan in the particular instance.

877 F.2d at 444 (alteration in original).

The first step of the analysis involves the consideration of three factors: (1) whether the plan has been uniformly constructed; (2) whether the relevant language of the plan has been given a fair and reasonable reading; and (3) whether a given interpretation will subject the fund to substantial unanticipated costs in relation to the fund's

assets. If at the conclusion of the foregoing analysis the Court determines that the fund Trustee's interpretation was "legally correct" then the inquiry ends. However, if the Trustees' interpretation is not legally correct, it must still be determined whether or not that interpretation is an abuse of discretion. This second step of the analysis requires that the following factors be considered: (1) whether the plan is internally consistent as interpreted by the Trustees; (2) whether the interpretation offered runs afoul of any relevant regulations; and (3) whether the factual background of the particular interpretation supports any inferences of lack of good faith. *Batchelor*, 877 F.2d at 445. Finally, *Batchelor* reemphasizes the importance of plan text: "[w]hen the trustee's interpretation of a plan is in direct conflict with express language in a plan, this action is a very strong indication of arbitrary and capricious behavior." *Batchelor*, 877 F.2d at 445(*quoting Dennard).*

Similarly, the Eighth Circuit's decision in *Finley v. Special Agents Mutual Benefit Association, Inc.*, 957 F.2d 617, 621 (8th Cir. 1992), employs a five factor test which emphasizes the centrality of plan text:

> In determining whether the . . . Board's interpretation . . . [is] reasonable, we consider whether their interpretation is consistent with the goals of the Plan, whether their interpretation renders any language in the Plan meaningless or internally inconsistent, whether their interpretation

> conflicts with the substantive or procedural requirements of the ERISA statute, whether they have interpreted the words at issue consistently, and whether their interpretation is contrary to the clear language of the Plan.

In sharp contrast to these decisions of the Fifth and Eighth Circuits, the Seventh Circuit's *Gallo* decision has cut the tether between plan text and abuse of discretion analysis. First, the *Gallo* decision mounts a challenge to the Fifth Circuit's notion that it is possible for a court to determine a correct interpretation of a pension plan:

> . . . it is doubtful whether the terms 'correct' and 'incorrect' can be used to characterize answers to difficult interpretive questions presented by retirement plans. The details of such plans are inherently rather arbitrary . . . .

App., A-7-8.

In the *Gallo* decision, this philosophical nominalism takes the extreme form of divorcing abuse of discretion analysis from the presumptively arbitrary pension plan text. Rather, *Gallo* looks to whether the plan has articulated a plausible reason for its practice without regard to plan text. If the reason is plausible the so-called interpretation is not arbitrary and capricious:

> The reasons in favor of [the Administrator's] determination are at least as strong as the reasons against. The 'inconsistency' on which plaintiffs harp--the fact that the same term in the plan, 'earnings' is interpreted differently under two different formulas--is superficial.

App., A-8 (alteration added).

Thus, it is "superficial" to undertake a careful textual exegesis since that is *a priori* a fruitless inquiry. Plan text is subordinate to the justifications that are offered for a plan practice. Given that justifications for a particular practice are limited only by the imagination of the litigants, there is almost always some plausible reason that can be offered for a plan practice: "When challenged in court, the plan administrator can defend his interpretation with any arguments that bear upon its rationality." App., A-10. Thus, under the *Gallo* decision's ultra-deferential standard, the Trustee will virtually always prevail. The text of the plan and summary plan description may be ignored in the face of these more important abstract arguments. The Seventh Circuit's analysis in *Gallo* has spun away from any textual mooring.

Second, *Gallo* attacks the Eighth Circuit's method of reviewing the correctness of a Trustee decision by ascertaining whether the "interpretation is consistent with the goals of the Plan . . ." *Finley*, 957 F.2d at 621. From

its vantage point of extreme philosophical skepticism, *Gallo* insists that such an approach generally cannot be undertaken: "The details of such plans are inherently rather arbitrary, making recourse to purpose, the standard method of disambiguating documents, often futile." App., A-8. Thus, plan text becomes presumptively irrelevant to the most basic inquiry into ERISA beneft claims. The Seventh Circuit's holding in *Gallo* has abandoned one of ERISA's most fundamental touchstones of analysis.

In *Gallo* the Seventh Circuit violates a fundamental rule implicit in the act of interpretation: an interpretation should conform to the text of what is being interpreted so as not to falsify it. This rule is derived from *Firestone's* adoption of the trust-law model for review of denied claims. Under that model, as provided in the *Restatement (Second) of Trusts § 187, comment d*, one of the factors used to test for an abuse of a fiduciary's discretion is "[t]he existence or nonexistence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged . . . ." That standard's ultimate reference point must be the plan text.

Batchelor and *Finley* present the better reasoned approach to benefit claim denials and comport with ERISA and *Firestone*. Contrary to the decision in *Gallo* the Fifth and Eighth Circuits hold that written pension plans have meaning and that courts are capable of discerning that meaning through a careful analysis of their text. The Seventh Circuit has completely abdicated that role to pension

plan trustees and made their determinations virtually unreviewable. The *Gallo* decision exempts pension plan determinations from logical analysis by allowing an item of compensation to be both included and excluded from the same definition of "earnings" contained in the Plan. *Gallo* permits pension plans to create a "private language" of plan interpretation which need not be written or disclosed and which cannot be tested against the public meaning of plan terminology as revealed in the plan text or the summary plan description.

Petitioners would have prevailed under the Fifth and Eighth Circuit's analyses. That conclusion flows from the district court opinion in *Gallo*, showing, in line with *Batchelor,* that Amoco did not uniformly construe the language of the plan, (App., A-17-21, A-27-28) that its reading was not fair and reasonable, (*Id.*, A-27-30) and Amoco's admission that the unanticipated costs to the plan of paying plaintiffs' claims would be *de minimis*. (*Id.*, A-22-23). Also in line with *Batchelor*, the district court found Amoco's interpretation to be arbitrary and capricious because it was internally inconsistent (*Id.*, A-21, 29), undisclosed to plan participants (*Id.*, A-8), and that its purely *post hoc* justifications revealed "that Amoco seems to be making up the justifications for its treatment along the way." (*Id.*, A-27). Finally, the district court placed great weight on the *Finley* criteria that the interpretation of the Trustee under review be viewed in light of the goals of the Plan. On this point, the district court carefully reviewed the plan, and determined that Amoco's exclusion of pay in lieu

of vacation from one formula of the plan was inconsistent both with specific provisions of the Amoco Plan and with the whole purpose of such final average pension plans. (*Id.*, A-31-33).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

James R. Potter
Counsel of Record for Petitioners

Miriam N. Geraghty
Jesse A. Wing
KINOY, TAREN, GERAGHTY & POTTER, P.C.
332 S. Michigan Ave., Suite 1705
Chicago, Illinois 60604
Telephone: 312-663-5210
Attorneys for Petitioners